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In The

Supreme Court of the United States

October Term, 1939.

No. 570.

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN C. SHAW, Administrator De Bonis Non of the Estate of Sydney C. McLouth, Deceased.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF FOR RESPONDENT IN OPPOSITION.

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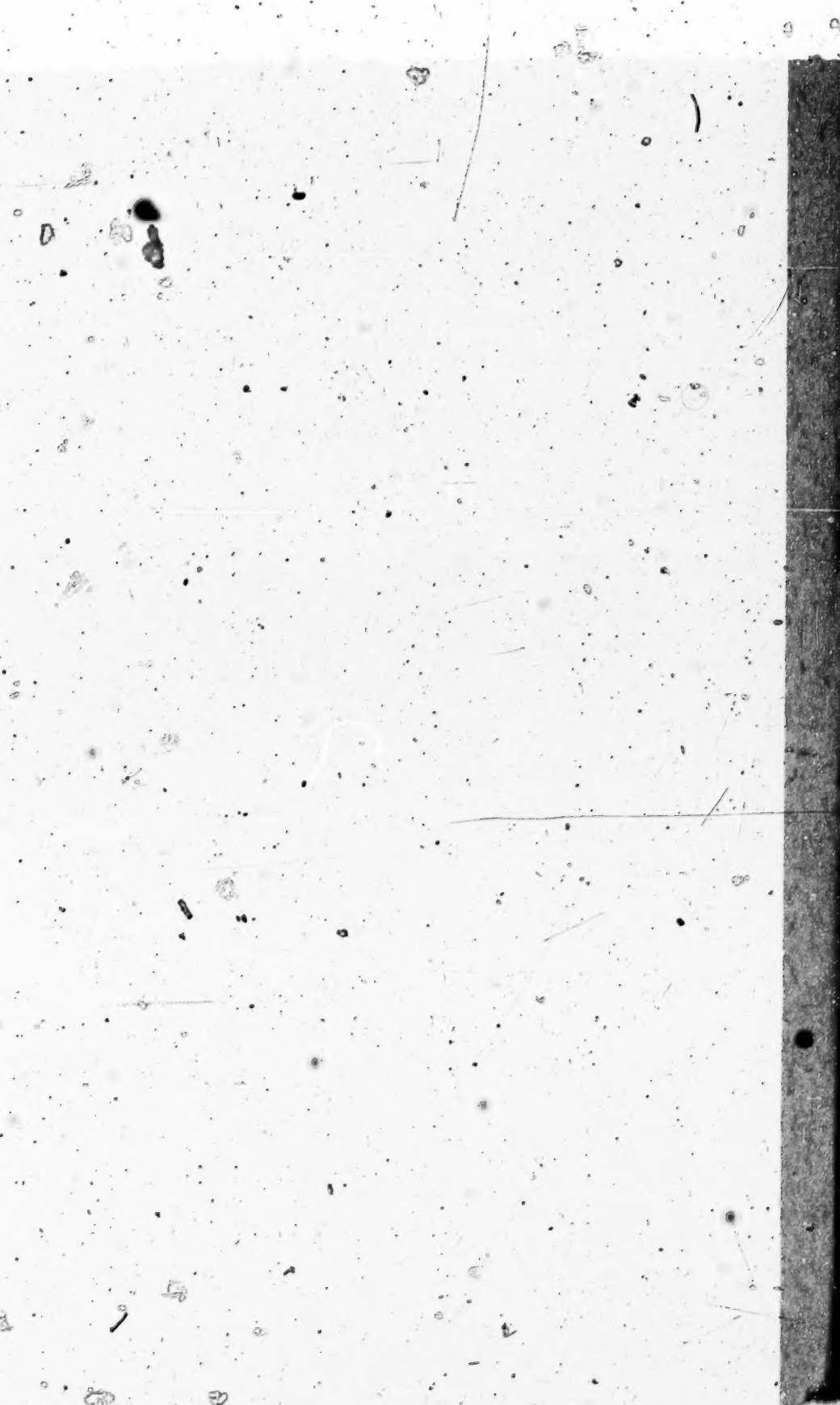

SUBJECT INDEX.

		Page
Opinion below		1
Jurisdiction		2
Question presented		2
Statement of the case		2
Summary of argument		5
Argument:		
Point A.	There is no special or important reason for issuance of writ	6
B.	The probate court's order is a judicial ascertainment of amount only and does not constitute a money judgment against the United States	8
C.	The probate court's order, whether it be termed a judgment or judicial determination of amount, was eminently proper under the decisions of this court	16
Conclusion		25

CITATIONS.

Cases.

Allison v. Smith, 16 Mich. 405 15
American P. and Mfg. Company v. United States, 300 U. S. 476 23
Case v. Terrell, 11 Wall. 199, 20 L. Ed. 134 20
Danforth v. United States, 102 Fed. (2d) 5 14
DeGroot v. United States, 5 Wall. 419, 427, 433 (18 L. Ed. 700) 18, 19
Flying Scud, 6 Wall. 263 23
Grady v. Hughes, 64 Mich. 540 11
Guaranty Trust Company v. United States, 304 U. S. 134 23
Holbrook v. Cook, 5 Mich. 225 10
Ingram-Day Lumber Company v. McLouth, 275 U. S. 471 ..... 3, 7-8
In re Brown's Estate, 198 Mich. 563 15
In re McLouth's Estate, 281 Mich. 191 2
In re Meredith's Estate, 275 Mich. 295 15
In re Quinney's Estate, 287 Mich. 335 11
Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 389 23
Labuan, Blatchf. Prize Cases, 165 22
Lafferty v. Peoples Savings Bank, 76 Mich. 35 15
Lee v. Kaufman, 15 Fed. Cas. 162, 198-199 20
McRoberts v. Lyon, 79 Mich. 33 15
Mich. Miss. Society v. Corning, 164 Mich. 396 15
Montgomery v. Wayne Circuit Judge, 284 Mich. 430 15
Mower's Appeal, 48 Mich. 441 15
Nassau Smelt. Works v. United States, 266 U. S. 101 14
Neblett v. Carpenter, 305 U. S. 297 7
People ex rel. Fraser v. Wayne Circuit Judge, 39 Mich. 198 15
Pufahl v. Parks, 299 U. S. 226 15

Reeside v. Walker, 11 How. (52 U. S. 288, 289).. 13, 18
Schaumburg v. United States, 103 U. S. 667, 26 L. Ed. 599 20
Shaw v. United States, 75 Fed. (2d) 175..... 3
Smith v. Shawhan, 37 Iowa 533 11
Stevens v. Hope, 52 Mich. 65 15
Sybil, Blatchf. Prize Cases, 615..... 22
The Barbara Cates, 17 Fed. Supp. (D. C. Pa.) 241 14
The Glen, Blatchf. Prize Cases, 375..... 22
The Gloria, 286 Fed. 188 ..... 14, 16
The Nuestra Senora de Regla, 108 U. S. 92, 2 Supr. Ct. 287, 27 L. Ed. 662 ..... 21, 22
The Paquete Habana, 189 U. S. 453, 23 Sup. Ct. 593, 47 L. Ed. 900 ..... 21, 22
The Siren, 7 Wall. 152, 152, 19 L. Ed. 129..... 19
United States v. Eckford, 6 Wall. (73 U. S. 487) 8, 19
United States v. Moscow-Idaho Seed Company, 92 Fed. (2d) (C. C. A. 9) 170..... 14
United States v. National City Bank, 83 Fed. (2d) 236, 106 A. L. R. 1235 (certiorari denied, 299 U. S. 563) 14, 23
United States v. Skinner & Eddy Corp., 35 Fed. (2d) 889 13
United States v. The Thekla, 266 U. S. 340..... 14, 23
United States v. U. S. Fidelity & Guaranty Company, 106 Fed. (2d) 804 23
Washington Gas Company v. D. of C., 161 U. S. 316 at page 329 7

Statutes, and Other Citations.

Act Mar. 3, 1797	18
H. R. 7615, Section 854	6
Merchant Marine Act, June 29, 1936, c858, etc.	24
Michigan Compiled Laws, Sections 15519-15520	9
Michigan Compiled Laws, Sections 15681-15682	12
President's Veto, 78 Cong. Record, Part 11, page 12457	6
Rev. Stats., Section 951	13
1 Stat. 512	18
49 Stat. 1987	24

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OPINION BELOW.

The opinion of the Supreme Court of Michigan is now officially reported in Volume 290 of Michigan Reports, at page 311.

JURISDICTION.

Jurisdiction is invoked under Section 237 (b) of the Judicial Code on allegation that the decision denied an immunity claimed by petitioner under the Constitution and statutes of the United States.

QUESTION PRESENTED.

It is respectfully suggested that petitioner's statement of presented question is inaccurate and that the true question is:

Where the United States voluntarily presents a claim against a decedent's estate in a state probate court and prosecutes such claim to final judicial determination in such court, and where a set-off against such claim is duly asserted and ultimately upheld on the merits by a final judgment of the highest court of such state, does such probate court, on remand, possess jurisdiction to enter an order in accordance with the local statutory practice by which the excess of the adjudicated set-off over the claim is "ascertained and allowed"?

STATEMENT OF THE CASE.

Petitioner's Statement of the Case omits the following material facts:

The merits of the instant set-off, and the Fleet Corporation's obligation to pay it, were adjudicated and placed at rest by judgment of the Michigan Supreme Court on *former appeal (In re McLouth's Estate, 281 Mich. 191)*.

That decision was rendered in 1937, and no review was ever sought in the present court.

So that this court may readily comprehend the various proceedings which were taken in the Michigan courts and the consequent finality of such judgment, we respectfully submit the following outline taken chronologically from the reported cases:

In May of 1920 U. S. Shipping Board Emergency Fleet Corporation, acting in behalf of the United States, undertook with McLouth for consideration to assume and pay his certain debt to Ingram-Day Lumber Company. See both opinions of Michigan Supreme Court—*281 Mich. 191; 290 Mich. 311.* The debt not being paid, Ingram-Day Lumber Company sued McLouth. The Government and its own staff of attorneys took complete charge of McLouth's defense, but were unsuccessful, and judgment against McLouth's administrator in the sum of $42,789.96 was ultimately recovered. *(Ingram-Day Lumber Company v. McLouth, 275 U. S. 471).* This judgment was thereafter duly allowed (by the Michigan Probate Court holding jurisdiction over the estate) as a proper claim against McLouth's Estate in the sum of $58,089.04, including interests and costs (R. 14, 15).

In June of 1933 the United States, as a result of supplemental contractual dealings between McLouth and the Fleet Corporation, recovered its own judgment against McLouth's administrator in the sum of $40,165.40, which was duly affirmed on appeal *(Shaw v. United States, 75 Fed. 2nd 175).* This judgment was made the basis of a claim which was duly presented by the Government with petition to such Probate Court for due allowance thereof. In accordance with local statutory practice the administrator exhibited.

and proved, in offset, the Ingram-Day claim and the Government's covenant to assume and pay same. On first hearing the probate court allowed the Government's claim and disallowed the set-off. On appeal to the Circuit Court of Michigan (an appellate court in probate cases),[1] the Probate Court's order was reversed and the set-off was upheld. On appeal to the Supreme Court of Michigan, the Circuit Court's judgment was affirmed *(281 Mich. 191)* and the case was remanded to the Probate Court with instructions.

One question only was left open for decision by the Probate Court on such remand (R. 14, 43). That question was: should statutory "ascertainment and allowance" be made of the excess of the adjudicated set-off over the claim as presented? (R. 42). Such question was resolved in favor of the estate by order of the Probate Court (R. 16) and the order was duly affirmed on appeal to the Supreme Court of Michigan. The latter court's judgment of affirmance is the decision sought to be reviewed by the instant pplication for writ of certiorari.

1. See collection of cases in opinion of Michigan Supreme Court (R. 74).

SUMMARY OF ARGUMENT.

POINT A.

There is no special or important reason for issuance of writ because: (a) The Government's obligation to the estate was adjudicated by a now final judgment of the Michigan Supreme Court; (b) There is no question as to the fact or amount of the adjudicated obligation, and (c) The question of affirmative ascertainment of amount is consequently unsubstantial and goes to the mere form of a lower court judgment on remand.

POINT B.

Regardless of whether an affirmative judgment for the excess of a set-off may be entered against the Government in a suit instituted by it, the instant probate court order as affirmed by the Michigan Supreme Court constitutes at most a permitted judicial ascertainment that, on striking a balance of just demands, the Government is indebted to the estate in an ascertained amount. The order is consequently in accord with, and does not vary from, the early decisions of this court that are relied upon by petitioner.

POINT C.

The probate court's order, whether it be termed a judgment or judicial determination of amount, was eminently proper under the decisions of this court.

ARGUMENT.

POINT A.

There is no special or important reason for issuance of writ.

More than 19 years ago the United States, acting through its agent, The Fleet Corporation, undertook with McLouth that it would assume and pay his debt to Ingram-Day Lumber Company. The promise has never been kept and the Government has meanwhile shamefully litigated Ingram-Day Lumber Company and a small estate through twelve separate decisions of various state and federal courts in continual effort to evade its promise. Notwithstanding that Congress once enacted a bill for payment of the debt to Ingram-Day Lumber Company,[2] and notwithstanding that the reason for Presidential veto of the bill[3] has now been satisfied through *pro tanto* application of the Government's claim to the Ingram-Day debt, the Government continues this litigation in repudiation of its promise even though there is now no question as to the fact or amount of its adjudicated liability.

We allude to these facts as evidence that there are special and important reasons why the Government should not be permitted to prolong this litigation and that its litigious conduct should incline this court's discretion against issuance of the applied for writ. The instant petition for certiorari is necessarily reduced to conten-

2. *73rd Congress, 2nd Session, H. R. 7615, S. 854.*

3. The bill was vetoed by President Roosevelt for the following reason: "Disapproved because no provision is made for the Government's counterclaim." *Congressional Record, Vol. 78, Part 11, Page 12457.*

tion that the Government's admitted liability should not be recorded by formal judicial determination and, in such connection, it is respectfully emphasized that the Supreme Court of Michigan, on former appeal *(281 Mich. 191)*, made final ruling that the United States was liable for payment of the Ingram-Day claim as filed and allowed against the estate (amount and date of allowance shown on pages 14 and 15 of record).[4]

If there could be any claim that the United States is not liable in fact to the amount ascertained by the Courts of Michigan, then a meritorious reason for review might exist. However, in the absence of such claim (either in the Michigan Supreme Court or in the instant petition) and in view of the presumption by this court that there was substantial evidence to sustain the lower court's order *(Neblett v. Carpenter, 305 U. S. 297)*, it is submitted that no Federal question of substance is involved and that there is no special or important reason for issuance of writ. This court made final adjudication, in *Ingram-Day Lumber Company v. McLouth, 275 U. S. 471*, of the fact and amount of McLouth's debt to Ingram-Day Lumber Company, and the Supreme Court of Michigan made final adjudication of the Government's liability to pay such debt. We quote from the Michigan Supreme Court's opinion on such former appeal *(281 Mich., at page 200)*:

> "The judgment *(275 U. S. 471)* became the liability of appellant (United States) either as principal or as assignee of the Fleet Corporation."

Consequently, the question for present review relates only to the mere form of final order on remand. The

4. Furthermore, the Government having unsuccessfully defended McLouth in the *Ingram-Day case*, became thereby concluded as to its liability over. *Washington Gas Company v. District of Columbia, 161 U. S. 329.*

Government's liability, as determined on former appeal, is not increased or adversely affected by a "judicial ascertainment" of the uncontroverted amount, and the order in question merely determines and formally records same.

POINT B.

The probate court's order is a judicial ascertainment of amount only and does not constitute a money judgment against the United States.

The solicitor general alleges that the Michigan Supreme Court has decided the question sought to be reviewed in a way not in accord with *United States v. Eckford, 6 Wall. (73 U. S.) 487.* Primarily, therefore, we cite the following excerpt from the *Eckford* decision:

> "Without extending the argument, we adopt the views expressed by this court in the case of *De Groot v. United States*, decided at the last term, that when the United States is plaintiff and the defendant has pleaded a set-off, which the Acts of Congress have authorized him to do, no judgment can be rendered against the Government, although it may be judicially ascertained that, on striking a balance of just demands, the Government is indebted to the defendant in an ascertained amount."

It is at once apparent that the solicitor general offers no argument to the point that a money judgment, as distinguished from a judicial ascertainment of amount, was entered by the Probate Court and approved by the Michigan Supreme Court. As evidence that the Probate Court did not and could not enter a money judgment as

distinguished from a judicial determination of amount owing, we respectfully present the following review of the powers and jurisdiction of such Probate Court.

The general powers and jurisdiction of the court are defined and declared by Sections 15519 and 15520 of the Michigan Compiled Laws of 1929 (Mich. Stat. Ann. 27.2619; 27.2620), and we quote same in full as follows:

> "Each judge of probate shall have jurisdiction:
>
> 1. Of all matters relating to the settlement of the estates of all deceased persons, whether testate or intestate, who were at the time of their decease inhabitants of, or residents in his county, and of all who shall die without the state leaving any estate within such county to be administered;
>
> 2. Of trusts and trustees in the execution of wills and administration of estates of deceased persons;
>
> 3. To appoint guardians to minors and others in the cases prescribed by law, and of the settlement of the estates of such minors and others under guardianship;
>
> 4. Of all cases of juvenile delinquents and dependents;
>
> 5. And shall have and exercise all such other powers and jurisdiction as are or may be conferred by law;
>
> 6. And to that end he may, upon the filing in said court of a petition therein, within ninety (90) days of the original hearing, or of the rendering or making of any order, sentence or decree, as the case may be, and after due notice to all parties interested, grant rehearings, and may modify and set aside orders, sentences and decrees rendered in such court: Provided, however, That the jurisdiction conferred by this section shall not be construed to deprive the circuit court in chancery in the proper county of concurrent jurisdiction as originally exercised over the same matter."

"Each judge of probate shall have power:

1. To administer all oaths necessary in the transaction of business before the probate court, and all oaths required by law to be administered to persons executing trusts under the appointment of such court;

2. To issue all warrants and processes in conformity to the rules of law, which may be necessary to compel the attendance of witnesses residing in any part of this state, or to carry into effect any order, sentence or decree of the probate courts, or the powers granted them by law, and to issue warrants directed to any sheriff, constable or other proper officer in this state, requiring him to apprehend and imprison any person who shall refuse or neglect to perform any order, sentence or decree of a probate court, requiring such officer to apprehend and imprison such person in the common jail of the county, until he shall perform such orders, sentence or decree, or be delivered by due course of law; and all such officers shall serve and execute all legal warrants and processes to them directed by any judge of probate;

3. To keep order in his court, and to punish any contempt of his authority, in like manner as such contempt may be punished in the circuit court;

4. And shall have such other powers as may be conferred by law."

It is noted that no power to enter judgment, money or otherwise, is conferred, and that no power to issue execution is granted. We represent that the adjudicating power and jurisdiction of the probate court is limited to orders, sentences and decrees; that proceedings in such court are essentially *in rem* and are not *inter partes*, and that the powers of the court are purely statutory.

In *Holbrook v. Cook, 5 Mich. 225*, it was relevantly declared:

"It is true probate courts are 'courts of record,' being declared to be such by the constitution, but

they are not 'courts of law,' according to the ordinary use of the term. They derive their origin and jurisdiction from a source altogether distinct from the common law, and they exercise no functions peculiar to that system. Parties cannot litigate questions of fact in them, except in the instance of probate of wills, or when the power of appointment is to be exercised; and then no issues are joined by pleadings, no juries are known, *and they render no judgments—their determinations being called orders, sentences or decrees*—and upon summary inquiry, with or without notice, as the case may be."

In a recent case *(In re Quinney's Estate, 287 Mich. 335)* the Michigan Supreme Court made exhaustive collection of the authorities which support our representation that, because no statute grants the power, the probate court is without jurisdiction to render money judgments. On the strength of eighteen cases which were cited or quoted from, the court reaffirmed the following:

"The probate court derives none of its jurisdiction or power from the common law, *Grady v. Hughes, 64 Mich. 540*, but must find the warrant for all its doings in the statute."

In *Smith v. Shawhan, 37 Iowa 533*, the distinction between a judgment and a probate court order of allowance was clearly stated in the following language:

"One of the necessary incidents of every judgment is its means of enforcement by execution. An order of the county court allowing a claim against an estate and ordering the payment of such claim cannot be thus enforced. The county court has no power to issue execution upon such an order. We are of opinion that the filing and allowance of the plaintiff's claim in the county court did not constitute a 'judgment,' in the sense in which that term is used in the clause of the statute of limitations which we have been considering, and consequently that the claim of

the plaintiff is not barred as a judgment of a court not of record."

With the foregoing authorities in mind, we respectfully submit that the probate court did not, by its presently criticized order, enter a money judgment against the United States. The statutory limitation of its powers, and the very wording of the particular statute under which it assumed to act, clearly show that a judicial ascertainment of amount is all that could have been or was done. The statute in question provides:

> "When a creditor against whom the deceased had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be; but no claim barred by the statute of limitations shall be allowed by the commissioners in favor of or against the estate, as a set-off or otherwise."

Compiled Laws Michigan, 1929, Section 15682 (Mich. Stat. Ann. 27.2829).[5]

Attention is respectfully directed to a most striking similarity of language and phraseology. The *Eckford case* permits "judicial ascertainment that, on striking a balance of just demands, the Government is indebted to the defendant in an ascertained amount." The Michigan statutes directs that the commissioners on claims (or court acting in their stead as the case may be) "shall ascertain and allow the balance against or in favor of the

5. By another statute (Compiled Laws, Michigan, 1929, Section 15681; Mich. Stat. Ann. 27.2828) the Probate Judge may, in his discretion, act in the place and stead of Commissioners on Claims. He did so throughout the proceedings which were instituted by the Government in the present case (R. 9, 15, 17).

estate as they shall find the same to be." No power to direct or command payment of the ascertained amount, or power to issue execution therefor, is expressed and, as will be seen from authorities cited above, none can be implied.

It may be inquired: What is the status of a similar statutory ascertainment of balance as against a private claimant? The answer is that such a determination can be made enforceable only by suing out of a writ of *scire facias* thereon in a court competent to render money judgments and issue execution. *Cf. Reeside v. Walker, 11 How. (52 U. S.) 288, 289.* Michigan retains the common law writ of *scire facias* and permits actions in its circuit courts thereon. *McRoberts v. Lyon, 79 Mich. 33.*

It is submitted that the distinction made by the *Eckford case* between a judgment on the one hand and a judicial ascertainment or determination of amount on the other, is clear, and that the instant probate court order qualifies in every respect for accord therewith. This court obviously intended, when it declared decision in the *Eckford* and *DeGroot cases,* to preserve the sovereign dignity from the command of a judgment and yet, in the interest of complete adjudication and early settlement of dispute, to permit judicial ascertainment of amount owing by either party on striking a balance of proper demands.[6]

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6. The instant set-off was duly presented and rejected under Section 951 of the Revised Statutes. See recorded concession of the fact in 281 Mich. at page 198. Construing said Section 951 the Court of Appeals of the Ninth Circuit said *(United States v. Skinner & Eddy Corp., 35 Fed. 2nd 889):*

> "The Congress of the United States, as early as 1797, granted the right to sue the Government by way of claims for credit, solely as a defense in suits brought by it, *and incidentally to adjudicate the amount of such claims where they had been presented to the accounting officers of the Treasury and by them disallowed in whole or in part."*

This court denied certiorari *(299 U. S. 563)* to review *United States v. National City Bank, 83 Fed. (2d) 236, 106 A. L. R. 1235.* In that case the court of appeals of the Second Circuit upheld an affirmative ascertainment of amount owing by the Russian Government (the United States was substituted *pendente lite* for the Russian Government as plaintiff and appellant) on determination of claim and counterclaim. We take the following from the affirmed District Court opinion *(4 Fed. Supp. 417)*:

> "The offset must therefore be allowed, and this involves a determination of the amount of it. Injustice to the defendant would be prevented by merely finding that the offset is sufficient to defeat the plaintiff's recovery, but equity ought not to leave the adjudication incomplete. There should be a determination of the exact amount due to the National City Bank, without, of course, any direction that the plaintiff pay the excess or that it be subject to a judgment for the excess.
>
> Settle decree accordingly, but without costs."

It is said that the doctrine of *United States v. The Thekla, 266 U. S. 340,* which was followed and applied by the courts below, is narrowly limited to collision cases and has no application to the ordinary common law action *in personam.*[7] *Danforth v. United States, 102 Fed. (2) 5* (reversed in part and affirmed in part by this court December 4, 1939—No. 309) is cited in support. Momentarily assuming but not conceding[8] that to be true, is not the doctrine of *The Thekla* yet applicable here?

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7. The same contention was made on page 10 of the petition for certiorari in *United States v. National City Bank (299 U. S. 563).*

8. The contention was discredited by reasoned argument of Judge Mack in *The Gloria, 286 Fed. 488,* likewise in *United States v. Moscow-Idaho Seed Company, 92 Fed. (2d) (C. C. A. 9) 170,* and *The Barbara Cates, 17 Fed. Supp. (D. C. Pa.) 241.* In last case *Nassau Smelting Works v. United States, 266 U. S. 101,* is distinguished from present situation at page 241. See also treatment of this question by Michigan Supreme Court, R. 77.

Proceedings in a Michigan Probate Court, like proceedings against a ship in admiralty, are essentially *in rem* to determine the status of the *res*, and are not proceedings *inter partes*.

Allison v. Smith, 16 Mich. 405;
People ex rel. Fraser v. Wayne Circuit Judge, 39 Mich. 198;
Mower's Appeal, 48 Mich. 441;
Stevens v. Hope, 52 Mich. 65;
Mich. Miss. Society v. Corning, 164 Mich. 396;
In Re Brown's Estate, 198 Mich. 563;
In Re Meredith's Estate, 275 Mich. 295;
Montgomery v. Wayne Circuit Judge, 284 Mich. 430.

The proceedings being *in rem*, it is submitted that there is no essential difference between a determination of libel and cross libel in admiralty and a determination of claim and counterclaim in a Michigan Probate Court. The Government, by its voluntary institution of a local proceeding to impress and enforce a lien *(Lafferty v. People's Savings Bank, 76 Mich. 35)* on the *res*, is bound by the local rules of procedure and law of substantive rights. It was so held as against a National Bank receiver who voluntarily filed claim against an estate in the Probate Court of Illinois *(Pufahl v. Parks, 299 U. S. 226)*,[9] and we respectfully suggest that the voluntary filing of a claim against the *res* in control of a Michigan Probate Court, whether by the United States or by a citizen, fits the act of submission to what was said in *The*

9. This court said: "The receiver may, as petitioner elected to do, prosecute his claim in a state court. If he does, at least in the absence of congressional declaration to the contrary, the litigation will be governed by the common and statutory law of the state. Thus the local statute of limitations applies and the local law as to the extinguishment of the estate and the liability *vel non* of distributees controls."

Thekla, viz., "As has been said in other cases, the question of damages to the colliding vessel necessarily arose [10] and it is reasonable for the court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States."

POINT C.

The probate court's order, whether it be termed a judgment or judicial determination of amount, was eminently proper under the decisions of this court.

An able and prophetic review of this question, and of its historical development and progress, was made by Judge Mack in *The Gloria, 286 Fed. 188.* We adopt its relevant context as follows:

> "As the right of set-off and counterclaim gradually comes to be regarded as affecting the substantive rights of the litigants, one would expect to find courts reluctant to give judgment in favor of a sovereign state, where judgment would, in the circumstances, be denied a private litigant because of the right of set-off or counterclaim. Once the first hurdle is past, and it is recognized that the defendant in suit brought by a sovereign state is not limited in his defense to strict common law recoupment, but may assert the broader right of set-off, it may be expected that a modern court of equity, of admiralty, or even of law will be impatient of any restrictions on its jurisdiction to determine judicially all questions involved in the controversy or controversies submitted. While a court may have no power

10. In the present case the question of counterclaim necessarily arose in the Probate Court by command of the only statute under which the court might proceed in view of the actual existence and exhibition of the estate's counterclaim. The statute is peremptory.

to enforce an affirmative judgment against a sovereign state, still if, as a defense to a suit instituted by a sovereign state, a counterclaim or set-off is asserted, it would seem only proper that the court determine all issues fairly before it, even though it involve a finding that the plaintiff state was indebted to the defendant. A modern court should strive to do complete justice; a partial and incomplete adjudication tends only to protract and complicate litigation to the detriment of all concerned. A partial and incomplete adjudication leaves all parties in grave doubt as to their status and rights, and leads to a multiplicity of suits.

"A sovereign state, generally speaking, is not obliged to go into court; but, if it seeks the assistance of the court, it would seem to be in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction of the court in respect of any set-off or counterclaim properly assertable as a defense in a similar suit between private litigants. Although, perhaps, the defendant should not be permitted to assert any counterclaim which would not be, in whole or part, a defense to the action brought by the state, yet, if it is necessary to examine a counterclaim for the purpose of determining whether there is a defense to the original action, it would seem inconsistent with the duty of a court of general jurisdiction to do complete justice for the court not to determine the whole nature and extent of the counterclaim, even though it involved incidentally a determination that a sovereign state was indebted or obligated to the defendant.

"There is no principle of public law exempting a sovereign state from its obligations under the law. It should not be assumed that a state desires to deny or evade its obligations. There may be sound reasons of public policy why a state should be immune from the harassment of litigation in forums and under conditions not agreeable to the state. But, once the state has chosen its forum, there seems little reason in law or policy why it should not be subject

to the substantive requirements of law and justice."

"Most of the early cases in the United States Supreme Court arose in connection with the Act of Congress of March 3, 1797 (1 Stat. 512), which provided, among other things, that, where a suit is instituted against any person indebted to the United States, the court shall on motion grant judgment at the return term, unless the defendant shall in open court, make oath or affirmation that he is equitable entitled to credits, which had been previous to the commencement of the suit, submitted to the consideration of the accounting officer and rejected. Although it may be doubted whether at this early stage anything more than the strict and limited right of recoupment would, in the absence of statute, have been recognized, it was supposed at one time that the statute authorized the court to render an affirmative judgment against the Government for any balance found due the defendant, and there were some judgments of the Circuit Courts to that effect. But the Supreme Court drew back from what was apparently regarded at that time as a radical innovation.

"In *Reeside v. Walker, 11 How. 272, 13 L. Ed. 693*, the Circuit Court had rendered an affirmative judgment against the Government and the judgment creditor sought to mandamus the Secretary of the Treasury to pay the same. The Supreme Court, denying the mandamus, held, *obiter dictum*, that an affirmative judgment could not be rendered against the Government. *No attempt apparently was made by court or counsel to distinguish the rendering of the judgment from its enforcement.* In *De Groot v. United States, 5 Wall. 419, 427, 433 (18 L. Ed. 700)*, in the course of his opinion, Miller, J., stated:

> 'The Government of the United States cannot be sued for a claim or demand against it without its consent. This rule is carried so far by this court, that it has been held that when the United States is plaintiff in one of the federal courts, and the defendant has pleaded a set-off which the

acts of Congress have authorized him to rely on, no judgment can be rendered against the Government, although it may be judicially ascertained that on striking a balance of just demands the Government is indebted to the defendant in an ascertained amount. And if the United States shall sue an individual in any of her courts, and fail to establish a claim, no judgment can be rendered for the costs expended by the defendant in his defense.'

"In *United States v. Eckford, 6 Wall. 484, 489, 18 L. Ed. 920,* the Court of Claims had considered itself conclusively bound by a judgment rendered by a Circuit Court against the Government, in a suit brought thereon in the Court of Claims. The Supreme Court went much further than was required for the purposes of the decision; in reversing the Court of Claims, Justice Clifford said:

'* * * Without extending the argument, we adopt the views expressed by this court in the case of *De Groot v. United States,* decided at the last term, that when the United States is plaintiff and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the Government, although it may be judicially ascertained that, on striking a balance of just demands, the Government is indebted to the defendant in an ascertained amount.'

"The next important decision is *The Siren, 7 Wall. 152, 154, 19 L. Ed. 129.* The Siren, while in charge of a prize crew, negligently ran into and sank the sloop Harper. The Siren, having subsequently been condemned as prize, the owners of the Harper asserted a claim for her, and her proceeds for the damages sustained by the collision. The claim was allowed by the Supreme Court, and it is interesting to note that, while the court still is inclined to limit the right of affirmative relief against the Government, it views the right of counterclaim and set-off against the Government, which has asked

the aid of the court, as a substantive requirement of equity and justice rather than a statutory privilege. The language of Justice Field is significant in showing the steady development of judicial thought:

> 'But although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy.' "

"In *Case v. Terrell, 11 Wall. 199, 20 L. Ed. 134*, the Supreme Court set aside an affirmative judgment rendered against the Government, but there the Government had not been made a party to the suit and had in no manner appeared in the case.

"In *Lee v. Kaufman, 15 Fed. Cas. 162, 198-199*, the Circuit Court, on the basis of the above decisions and on the assumption that no affirmative judgment could be rendered against the Government on a counterclaim, discussed the question whether it was proper none the less for the court to ascertain the amount due the citizen. As to this Judge Hughes said:

> 'Although a moneyed judgment cannot be rendered against the Government except where authorized by law, the mere fact that it cannot be, does not of itself suffice to defeat the jurisdiction of a court to ascertain what is due the citizen.'

"In *Schaumburg v. United States, 103 U. S. 667, 26 L. Ed. 599*, the Circuit Court had refused to

grant an affirmative judgment against the Government, and an appeal was taken to the Supreme Court. While the Supreme Court, relying on its earlier opinions, refused to reverse the lower court, it did indicate that the court might in a proper case permit the jury to certify the balance due from the Government. The words of Justice Miller were:

'While sometimes the jury have been permitted to certify to a balance they find to be due from the Government in cases of this kind, and under some circumstances it may be proper they should do so, a refusal of the court to direct that it be done cannot be reviewed here.'

"*The Nuestra Senora de Regla, 108 U. S. 92, 2 Sup. Ct. 287, 27 L. Ed. 662,* and *The Paquete Habana, 189 U. S. 453, 23 Sup. Ct. 593, 47 L. Ed. 900,* mark a considerable advance in the view of of the court. Both of these were prize cases; both were cases of wrongful seizure by the Government. And in both cases the court rendered on the counterclaim filed an affirmative decree in favor of the claimant and against the Government as libelant. *It may be possible to urge that a peculiar rule obtains in prize cases, but it is difficult to say that the court based its decisions on any such narrow ground.* Indeed, in *The Paquete Habana,* counsel for the claimant, apparently fearing that the court might draw back from the broad ground taken in *The Nuestra Senora de Regla,* argued that the claim of the owner of the vessel seized was simply for restitution of the property or its cash equivalent. *The court did not, however, adopt any restricted theory of this kind. It placed its decisions on the broad principle of modern law that, the Government having come into the court, the court would determine all questions necessary for the disposition of the entire controversy.* That being the case, the court properly embodied its determinations in the form of a decree. *It distinguished,* what it had failed to distinguish in the earlier cases, *the rendering of an affirmative judgment or decree from its enforcement or execution.*

"As the advance, which the decisions in *The Nuestra Senora de Regla* and *The Paquete Habana* mark in the law, has not been as widely recognized as might be expected, it seems to be worth while to quote at length passages relied upon.

"In *The Nuestra Senora de Regla, supra,* Chief Justice Waite, speaking for the United court, says:

'The first of the remaining questions to be considered is whether a decree can be entered against the United States for damages. * * * It is true any judgment that may be rendered [against the United States] cannot be judicially enforced, but the questions to be settled are judicial in their character, and are incidents to the suit which the United States were required to bring to enforce their rights as captors. * * * When, therefore, the United States, through the executive of the nation, waived their right to exemption from suit, and asked the prize court to complete the adjudication of a cause which was rightfully begun in that jurisdiction, we think the Government is bound by the submission, and that it is the duty of the court to proceed to the final determination of all the questions legitimately involved.'"

"The opinion in *The Paquete Habana, supra,* was written by Mr. Justice Holmes. The pertinent part of the opinion follows:

'The decree must run against the United States, if a decree is to be made. In *The Nuestra Senora de Regla, 108 U. S. 92, 102,* the court was of the opinion that the United States had submitted to the jurisdiction of the court so far as to warrant the ascertainment of damages according to the rules applicable to private persons in like cases. It seems to us that the facts here are not less strong. Decrees in cases which disclose no special circumstances have been recognized by subsequent statutes providing for their payment. The *Glen. Blatchf. Prize Cases, 375, Act of February 13, 1864, c. 10, 13 Stat. 575; Labuan, Blatchf. Prize Cases, 165, Act of July 7, 1870, c. 220, 16 Stat.*

649; Sybil, Blatchf. Prize Cases, 615, Act of July 8, 1870, c. 231, 16 Stat. 650; Flying Scud, 6 Wall. 263, Act of July 7, 1870, c. 219, 16 Stat. 649. See, also, *16 Stat. 650, c. 232; Id. 651, c. 234.'"*

Judge Mack was duly affirmed by this court in *United States v. The Thekla, 266 U. S. 340.* The wholesome doctrine of the *Thekla* has since shaped decision in *United States v. National City Bank, 83 Fed. (2) 236, 106 A. L. R. 1235 (certiorari denied, 299 U. S. 563); American P. and Mfg. Company v. United States, 300 U. S. 476; Guaranty Trust Company v. United States, 304 U. S. 134; United States v. United States Fidelity & Guaranty Company, 106 Fed. (2) 804,* plus a number of lesser court cases, and it is submitted that this rule, now wholly approved, marks completion of a decidedly progressive advancement in judicial thought. During the past twenty years the Government has done a great portion of its work through a constantly increasing number of corporations created by acts of Congress. The functions of these corporations have spread to and are interlaced in the lives and business of the farmer, the laborer and the business man. If these corporations are to function expeditiously; if citizens are to be encouraged in dealing with them, the courts should be unhampered in judicial adjustment and measurement of their undertakings. As this court noted in *Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 389:*

"Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of Government in economic affairs have greatly extended the use of independent corporate facilities for Governmental ends. In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. Congress has provided for not less than forty of such

corporations discharging Governmental functions, and without exception the authority to-sue-and-be-sued was included.

Such a firm practice is partly an indication of the present climate of opinion which has brought Governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope."

The instant claim and counterclaim grew out of contractual obligations undertaken between McLouth and one of these Governmental entities, i. e., the Emergency Fleet Corporation. The latter has recently been dissolved and its contractual obligations have been voluntarily assumed by the United States (Merchant Marine Act, June 29, 1936, c. 858, Title II, Sec. 203, 49 Stat. 1987). The contractual obligation of the Fleet Corporation to McLouth's estate has been adjudicated. Can there remain any legal or moral bar to judicial computation of amount and recording thereof?

CONCLUSION.

The justice of this case is too plain for argument. Litigation extending into its twentieth year should not be prolonged in the absence of compelling reason and the obligation of the United States to McLouth estate has been settled by final decision which is now more than two years old. If it were ever important that this court review the jurisdiction of the Probate Court, that review should have been sought in 1937 when the record presented the facts, circumstances and equities underlying the claim and counterclaim.

It is respectfully submitted in conclusion that the principles of fairness and justice which were announced in *The Thekla* need no further exposition and that the instant determination of amount does not offend the early decisions of this court upon which the Government relies. It is accordingly submitted that the petition for writ of certiorari should not be granted.

Respectfully submitted,

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